JD-177-98
Chadds Ford, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DIAMOND SYSTEMS, INC.

and Case No. 4-CA-24768

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS--LOCAL UNION 654, AFL-CIO

Mark Arbesfeld, Esq., for the General Counsel.
Randall C. Shauer, Esq., for the Respondent.
James R. Conroy, for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. A hearing in the above-captioned matter was held before me on September 8 and 9, 1997, in Philadelphia, Pennsylvania pursuant to a complaint issued on March 31, 1997 by the Regional Director for Region 4 of the National Labor Relations Board against Diamond Systems, Inc., the Respondent herein. The complaint was issued based on a charge and an amended charge filed respectively on March 21, 1996,[1] and March 31, 1997 by International Brotherhood of Electrical Workers--Local Union 654, AFL-CIO, herein the Union. It alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (herein the Act) by refusing to consider for employment, or to hire, named discriminatees James Conroy,[2] Steve McNally, Frank Dostellio, Rocky Rapposelli, Vince DeJohn, Kevin Dougherty, and Carl Phillips because of their membership in the Union. It further alleges that the Respondent also violated Section 8(a)(1) by unlawfully interrogating applicants for employment about their union affiliation, threatening to close its operations if employees brought in a union, threatening to inflict bodily harm on a Union official, creating the impression it was keeping its employees' union activities under surveillance, and maintaining an unlawful employment agreement.

On April 21, 1997, the Respondent filed an answer admitting some and denying other allegations in the complaint, and denying that it had engaged in any unfair labor practices. Procedurally, it denied that the matters raised in the March 31, 1997 amended charge pertaining to the above-described Section 8(a)(1) conduct are "sufficiently related" to the initial March 21, 1996 charge, and are therefore untimely under Section 10(b) of the Act.[3]

At the hearing, all parties were afforded full opportunity to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record. On the basis of the entire record in this proceeding, including my observation of the demeanor of the

[1] All dates herein are in 1996, unless otherwise indicated.
[2] Conroy was also business agent and president of the Union.
[3] Section 10(b) of the Act states, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

witnesses, and having duly considered briefs filed by the General Counsel and the Respondent,[4] I make the following

Findings of Fact

I. Jurisdiction

Respondent, Diamond Systems, Inc., is engaged in the business of field engineering and electrical contracting in industrial, commercial, and residential settings, and maintains its office in Chadds Ford, Pennsylvania.[5] During the calendar year preceding issuance of the complaint, the Respondent, in the conduct of its business operations, performed services valued in excess of $50,000 for customers located outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization as defined by Section 2(5) of the Act.

II. The Section 10(b) issue

In its answer, at the hearing, and again on brief, the Respondent asserts that the Section 8(a)(1) conduct set forth in the March 31, 1997 amended charge, alleging it unlawfully interrogated job applicants as to their union affiliation, threatened to close its operations if it became unionized and to physically harm a Union official, and created the impression of surveillance, is not related to the Section 8(a)(3) conduct in the initial March 23, 1996, charge alleging that it refused to consider or hire job applicants because of their union affiliation. Thus, it argues that the amended charge must be dismissed as untimely under Section 10(b) of the Act. Respondent's argument is without merit.

It is well-settled that an amended charge that would otherwise be untimely under Section 10(b) will be deemed to have been timely filed if the matters contained therein are "closely-related" to allegations contained in an original timely-filed charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988); see also, *Adam's Mark Hotel*, 325 NLRB No. 91, slip op. at 3 (1998), *Nephi Rubber Products Corp.*, 303 NLRB 151, 155 (1991); *Helnick Corp.*, 301 NLRB 128 (1991); *Columbia Textile Services*, 293 NLRB 1034, 1036 (1989). To satisfy the "closely-related" test, the new allegations must involve the same legal theory as the allegations of the initial charge and arise from the same factual circumstances or sequence of events. Another factor that may be considered is whether a respondent would raise the same or similar defenses to both allegations. Id.

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[4] The separate unopposed motions filed by the General Counsel and the Respondent to correct certain minor inaccuracies in the transcripts are hereby granted and received into evidence, respectively, as General Counsel Exhibit No. 32, and Respondent Exhibit No. 6. While no document has been received into evidence as Respondent Exhibit No. 5, one was marked and identified as such at the hearing (Tr. 408). The Respondent's motion has therefore been appropriately labeled and received into evidence as Exhibit No. 6.

Hereinafter, the General Counsel's exhibits are referred to "GCX" and Respondent's exhibits as "RX". References to the General Counsel's posthearing brief are identified as "GCB", and to Respondent's brief as "RB" followed by the appropriate page numbers. Reference to oral testimony is identified by the transcript (Tr.) and page number(s).

[5] The business is run out of a private residence owned by Greg Fulton, Respondent's owner and sole shareholder, and his wife Sue Fulton.

Applying the above analysis to the instant case, I find that the Section 8(a)(1) allegations raised in the March 31, 1997 amended charge are closely related to the initial March 23, 1996 charge. The timing and circumstances surrounding both sets of allegations make clear that they all arose from the same factual circumstances and sequence of events and present the same legal theory.[6] Thus, the questioning of applicants as to their Union status took place within a day or so after the Respondent learned that many of the individuals who called on March 4, to inquire about the ad, were affiliated with the Union. Having allegedly decided not to hire any of the named discriminatees because of their Union membership, the Respondent thereafter sought to assure itself, through the alleged interrogations, that those it was seriously considering for employment were devoid of any such affiliation. The Respondent's refusal to give any hiring consideration to the seven named discriminatees, followed closely thereafter by the interrogation of employees, its the alleged March 12, threat to close operations, and its alleged April 29, attempt at creating an impression of surveillance, all occurred within the same general time period and were, in my view, part of an overall scheme by the Respondent to prevent the unionization of its operations. See, e.g, *Nabors Alaska Drilling, Inc.*, 325 NLRB No. 104, slip op. at 11 (1998) and *Well-Bred Loaf, Inc.*, 303 NLRB 1016 (1991). As the Section 8(a)(3) and independent Section 8(a)(1) allegations were directed at the same unlawful object, e.g., to identify and thereby avoid hiring any Union applicants, the Respondent could reasonably be expected to raise the same or similar defense to both sets of allegations. Accordingly, I find a sufficient nexus between the Section 8(a)(1) allegations in the March 31, 1997 amended charge and the Section 8(a)(3) allegations in the March 26, 1996 original charge as to render the former allegations timely under *Redd-I*.

III. Alleged unfair labor practices

A. Factual background

As previously stated, the Respondent is owned and operated by Greg Fulton, who also serves as its president. Sue Fulton functions as Respondent's office manager. Her status, at issue here, will be more fully discussed below. On November 29, 1995, the Respondent purchased McCullough Electric, a former electrical subcontractor, from John McCullough (herein McCullough, Sr.), his wife, Patricia McCullough, and their son, William McCullough (herein McCullough) for $150,000. Under the terms of the purchase and sale agreement, the Respondent agreed to retain McCullough in its employ for a period of ten years (GCX-18, p. 8). Concurrent with that agreement, the Respondent also signed a consulting agreement with McCullough, Sr. under which the latter was to receive a bi-weekly payment of $1000, in exchange for serving "in a consulting capacity as an independent contractor with duties to be as the [Respondent's] Board of Directors may from time to time specify..." Greg Fulton testified that despite its wording, the consulting agreement was entered into on the advice of his accountant solely for the purpose of avoiding certain adverse tax consequences arising from the the sale, and that in fact no consulting arrangement was ever intended or put into practice by him. McCullough, Sr. was still receiving his bi-weekly payment as of the date of the hearing (GCX-20; Tr. 215).

In early March, McCullough, an admitted supervisor within the meaning of Section 2(11) of the Act, began looking to hire an electrican to replace an employee who was leaving

[6] The fact that both sets of allegations may invoke different sections of the Act does not preclude a finding that they are based on the same legal theory. See, *Fiber Products*, 314 NLRB 1169, fn. 3 (1994), enfd. 64 F.3d 935 (4th Cir. 1995).

Respondent's employ. With this in mind, McCullough prepared the following advertisement and gave it to Sue Fulton to place in a local newspaper:

> ELECTRICIAN-Must have good work habits. Min. 10 yrs. exp. in residential/commercial. Refers. req. Call (phone number).

On March 3, Sue Fulton ran the ad in the Delaware County Daily Times, a local newspaper. The next day, March 4, numerous individuals, including the seven named discriminatees, responded to the ad and spoke with Sue Fulton.[7] Sue Fulton testified that she asked each of the interested applicants who called on March 4, the same series of questions, e.g., their name, phone number, wage requirements, and whether they possessed a driver's license and had a means of transportation (Tr. 286, 306). She admits, however, that she did not follow any prepared script when talking to the callers. She further testified that she wrote down the information received from the applicants on slips of paper and then recorded the information into her computer. After entering the information into the computer, she either faxed or phoned the callers' information to McCullough.[8] Sue Fulton recalls that several of the callers mentioned to her that they had apprenticed with the Union.[9] However, she claims she was unfamiliar with Local 654 or with unions in general.

Alleged discriminatee Conroy was among the first to call on March 4, and testified that after doing so he notified McNally, Dostellio, Rapposelli, DeJohn, Dougherty, Phillips, and Union member (not an alleged discriminatee) Thomas Hart of the ad. All of these individuals were apparently at the Union hall on the morning of March 4, and, on receipt of the information from Conroy, placed individual calls to Sue Fulton soon after Conroy did. The substance of their phone calls is discussed infra.

B. The applicants

1. James Conroy

Conroy testified that Sue Fulton took his name and phone number and advised that someone would be contacting him. He recalls telling her that he was experienced in residential, commercial, and industrial electrical work, but did not provide any more specifics about his work experience because Sue Fulton did not request such information. He further claims that Sue Fulton never asked him for his salary requirements, or any questions about his Union status. After his first call, Conroy placed a second call to Sue Fulton to ask if he could visit Respondent's office and file a job application. Sue Fulton admits speaking with Conroy a second time and giving her approval for him to file a written application. She claims she did so reluctantly because she did not like the notion of strangers showing up at the office when she was alone, and that after agreeing to receive Conroy at the office she phoned her son-in-law

[7] While some of the discriminatees who testified could not specifically identify Sue Fulton as the one they spoke to on March 4, Sue Fulton's testimony makes clear, and the Respondent does not dispute, that she was the one who took all the calls that day.

[8] A computer-generated document identified by Sue Fulton as the list prepared by her and purportedly either faxed or orally read to McCullough was received in evidence as RX-1.

[9] Sue Fulton testified that when the last caller of the day mentioned he too had apprenticed with Local 654, she then realized that such information "must be important," and made sure she recorded that information into her computer, along with the other information she purportedly received from the callers that day.

and asked him to keep her company during Conroy's visit.[10] Conroy showed up at the office later that day, met with Sue Fulton and another gentleman (presumably the son-in-law), and after introducing himself as organizer and president of Local 654, handed Sue Fulton a business card, and soon thereafter completed an application in which he identified himself as a Union organizer (GCX-4). Sue Fulton admits Conroy made known his Union affiliation, and recalls him stating that he would be able to do "wonderful things for our Company." Conroy then asked to speak with the Company's owner. As the latter was not there, Sue Fulton assured him she would pass along his request (Tr. 134-136; 291-292).

Conroy testified that sometime after March 4, he learned of McCullough Electric from Union members Hassett and McCrohan, each of whom had purportedly applied for work with that particular company. He believes McCrohan was in fact hired by McCullough Electric and scheduled to begin working on March 11. On March 11, he called Sue Fulton to inquire about his application and was told the positions had been filled. Conroy claims he then obtained McCullough Electric's name from the phone book and called to discuss Union matters with McCullough. He further claims that Sue Fulton answered the phone and that when he asked to speak with McCullough about the Union, Sue Fulton told him McCullough would not be interested.[11] Sue Fulton recalls speaking with Conroy on March 11, but testified that Conroy asked only why the Company had not hired anyone from the Union or returned his call.

McCullough and Conroy did speak on or about March 11. McCullough claims he discussed with Conroy the type of work he did, and recalls Conroy mentioning the many benefits the Union had to offer and urging him to sign up with the Union and become a union shop employer. According to McCullough, he and Conroy discussed "in great detail" the economics of going union, including rates of pay, what the Company charged and earned per hour, and the type of negotiations that would have to take place for the Respondent to accept a contract from the Union. Conroy agrees that McCullough discussed with him the nature of Respondent's business, and recalls him mentioning that he had put long hours into the job and that "it wasn't easy being in business." However, he denies that any discussion of wages occurred during that conversation (Tr. 138, 150). Conroy further recalls McCullough saying that "if his shop went union, he would go out of business." McCullough admits making the remark but claims it was made in the context of what he understood the Union wage scale to be vis-à-vis what he could afford to pay and yet remain competitive (Tr. 354-355).

2. Chris Hassett

Hassett was the next to call after Conroy to inquire about the ad. He called around 8:00 AM on March 4, and spoke with Sue Fulton for some three minutes during which he gave her his name, phone number, and described his work experience,mentioning that he had a total of 11 years experience. He did not, however, specify how much of those 11 years was spent doing residential work, and admits having only three year of residential experience. Hassett also admits that Sue Fulton asked him for his salary requirements, but testified he did not provide her with a specific wage rate and told her only that he was open on the matter of wages. Unlike

[10] Although Sue Fulton testified this second conversation took place on March 5, Conroy's job application is dated "3-04-96", indicating that it must have occurred on March 4, as testified to by Conroy.

[11] McCullough explained that when someone calls the McCullough Electric phone number, it first rings at his home, which is where McCullough Electric was operating from before being purchased by Respondent, and is then forwarded to Respondent's office. This would explain why Sue Fulton answered the phone when Conroy dialed the McCullough Electric number.

the others, Hasett did not disclose his Union membership to Sue Fulton, explaining that he simply forgot to do so. Hassett recalls asking Conroy if he should call Sue Fulton back and tell her of his affiliation, but that Conroy suggested he not do so in order to see if the Respondent would call him back for a job. Hassett recalls asking Sue Fulton if he could fill out a job application, but Sue Fulton told him someone would get back to him (Tr. 44). As discussed below, McCullough in fact contacted Hassett later that day and offered him a job.

3. Kevin Dougherty

Dougherty testified that his call to Sue Fulton lasted only a few minutes, and that while he answered questions put to him by Sue Fulton, she never asked him about his prior earnings or, implicitly, about his wage requirements. He recalls telling Sue Fulton he had ten years combined experience as an electrician in the industrial, residential, and commercial fields, and also mentioning that he was certified as a welder. According to Dougherty, Sue Fulton stated that she was accepting applications over the phone, and that the individual responsible for reviewing them would be returning calls later that evening. Dougherty was never called back, and he did not follow up on his initial conversation with Sue Fulton.

4. Carl Phillips

Phillips testified his conversation with Sue Fulton lasted some five minutes. He recalls giving Sue Fulton his name, phone number, address, and work experience, telling her he had been trained as an electrician through the Union's apprenticeship program, and identifying himself as a Union member. He denies discussing his prior wage rate with Sue Fulton or being asked about it. Sue Fulton did ask if he was flexible in the type of work he was willing to perform, and if he was willing to travel. He responded affirmatively to both questions. Phillips claims he heard nothing more from Respondent until April 28, when Sue Fulton purportedly called and left a message with his wife asking that he call her back. Although Phillips could not say if Sue Fulton was calling to offer him a job, he testified he never returned her call because he was already employed.

5. Frank Dostellio

Dostellio testified he too called on March 4, and asked Sue Fulton if Respondent had any work available and was hiring. He claims Sue Fulton stated that Respondent was indeed hiring and had a "ton of work" available, and then asked about his work experience and if he was willing to travel. Dostellio stated he had electrical experience in the residential, commercial, industrial fields and was willing to travel. Dostellio further recalls asking Sue Fulton how much the job paid, and that Sue Fulton replied that the wage rate would be based on how much he knew. Dostellio claims he identified himself to Sue Fulton as a member of the Union. The entire conversation lasted some fifty seconds, and ended with Sue Fulton stating she would get back to him.

Dostellio claims he called again a few hours later and this time spoke with a younger woman who took his name and phone number and stated someone would be getting back to him. He testified that he indeed received a call a few days later from someone who sounded much like Sue Fulton. In response to the latter's questions regarding his experience and current work status, Dostellio recounted he had 15 years experience in the electrical field, was on layoff status, and named some of the electrical contractors with whom he had previously worked. Dostellio claims the woman then asked if the employers were union contractors and if he was a union member, and that he responded affirmatively to both queries. Dostellio claims the woman then indicated he could either come in and fill out an application, or they could mail

one to his home. Dostellio purportedly accepted the latter option and gave the woman his name and address, at which point she stated someone would be getting back to him.

Dostellio claims that when he did not receive the application in the mail, he called back and spoke to the second (younger-sounding) woman. After telling her he had not yet received the job application, the woman informed him that the jobs had been filled.

6. Rocky Rapposelli

Rapposelli called on March 4, and spoke to Sue Fulton about the ad. He recalls telling Sue Fulton he was interested in the job being advertised, giving her information regarding his past employment, stating he had ten years experience as an electrician and that he had gone through a government-approved apprenticeship program, and identifying himself as a Union member. He claims Sue Fulton never asked if he was seeking a particular wage rate, and that he never bothered to ask what Respondent was paying. He does recall her asking if he was willing to travel, to which he responded in the affirmative. As more fully discussed below, Rapposelli heard nothing more from Respondent until April 28, when he was called by Sue Fulton and asked to submit an application.

7. Vince DeJohn

DeJohn testified to calling Respondent on March 4, and to speaking with Sue Fulton for approximately two minutes. He recalls giving his name and identifying himself as a Union member, but claims Sue Fulton never asked what wage rate he was seeking. She did, however, say someone would be getting in touch with him. As discussed in more detail below, DeJohn was called on April 28, during Respondent's second round of hiring and asked to submit an application.

8. Tom Hart

Hart was not a Union member on March 4, but was in the process of becoming one. On that day, he was at the Union hall when Conroy asked him to assist in the Union's attempt to "salt" Respondent, which Hart understood to mean that if hired by Respondent he would "keep logs on them" to find out "if they have any type of discriminations against the Union" (Tr. 115). Hart agreed to do so in the hopes of improving his chances of becoming a Union member. Thus, when he too called on March 4, and spoke with Sue Fulton. In response to Sue Fulton's questions, Hart told her he had seven years total experience as an electrician, and less than two years of residential experience. He recalls that Sue Fulton asked him about his desired wage rate, and that he responded he would like to receive $13. an hour. Sue Fulton then mentioned that someone from "McCullough" would be contacting him. Hart did eventually become a Union member sometime in mid-May.

9. Stephen McNally

McNally too recalled speaking with Sue Fulton on March 4, when he called to inquire about the ad. After expressing his interest in the job, McNally claims Sue Fulton asked him for his name, address, phone number, work experience, and willingness to travel. McNally told her he was not averse to travelling, and that he had 23 years of experience, including a four year apprenticeship through the International Brotherhood of Electrical Workers. According to McNally, Sue Fulton never asked if he had any residential experience or whether he had a desired wage rate. The conversation, he claims, lasted only about five minutes, and ended with Sue Fulton stating she would contact him if there were any openings.

C. The job offers and hiring decisions

Of all who called on March 4, Hassett and Hart were the only ones offered employment by Respondent, although, as discussed below, only Hart accepted employment. Unlike the discriminatees, these two, as previously indicated, had not revealed their Union ties to Sue Fulton. McCullough, however, also offered McCrohan, and the latter accepted, employment with Respondent. McCullough testified that the first individual he called back to discuss his phone application was Hassett, and claims he did so because Hassett was the first name on the list provided to him by Sue Fulton on March 4 (Tr. 346). He claimed he called Hart because he wanted to use him as a helper inasmuch as the latter had indicated to Sue Fulton he only had eight years experience (Tr. 351-352). As to McCrohan, McCullough explained he offered him employment based on Hassett's recommendation, because Hassett and McCrohan had worked together before and would make a good team, and in the hope of inducing Hassett into accepting employment.

1. Hassett's job offer

Hassett, as noted, was called by McCullough sometime later in the day on March 4, and offered employment. While both agree that the conversation took place and that a job offer was made, they disagree as to what was said on other more pertinent matters. For example, Hassett recalls McCullough saying he would be working a 9-hour day, 45-hour week. McCullough denies having made any statement to Hassett ,or for that matter, to any other applicant, about the hours they would work, but does admit that employees were at the time working a minimum 9-hour day, 45-hour week (Tr. 378-379). On the question of wages, McCullough testified that Hassett asked for a specific wage rate somewhere between $12.00-$15.00 an hour, but could not recall the precise amount. Hassett makes no mention in his testimony of having asked McCullough for a specific wage rate, and testified only that McCullough asked him what he had been earning at his last job at Consolidated Electric. When he responded that he was earning $12.50 an hour, McCullough purportedly offered to pay him that amount, which Hassett agreed to accept. According to McCullough, Hassett also told him he had ten years of residential experience with Consolidated Electric. Hassett, however, denies ever telling McCullough that he had ten years of residential experience, and recalls telling McCullough only that he had "done commercial and residential industrial work." He further testified that while he had 11 years overall experience as an electrician, he in fact had only three years of residential experience (Tr. 27).

Hassett also testified that during this conversation, McCullough mentioned that Respondent's operations consisted of four divisions, one of which performed work at a refinery tank owned by BP Corp. He recalls telling McCullough that he had at one time worked for BP, and commenting that it was a shame that the BP employees were apparently on strike. McCullough, according to Hassett, responded that he "didn't agree with unions because he could see Philadelphia from his home, but he couldn't do work there because of the unions" (Tr. 28). McCullough was not questioned about, and consequently did not refute, the above remarks attributed to him by Hassett. Both Hassett and McCullough do, however, agree that McCrohan was mentioned during this conversation, and that McCullough became interested in hiring both Hassett and McCrohan as a team, the latter as a helper. The conversation apparently ended with Hassett asking for time to think over McCullough's job offer and discuss it further with his wife.

McCullough called back later that same day to inquire if Hassett had yet spoken to his wife. When Hassett replied he had not, McCullough called again the next day and told Hassett

he really wanted to hire him and McCrohan. Hassett asked McCullough if he had to submit an application, but McCullough simply told him, "the job is yours." (Tr. 30). Hassett claims he accepted the job, but that the next day he received a better job offer through the Union hiring hall. He then called Respondent and informed a woman who answered the phone that he had decided not to take the job. The woman, Hassett claims, told him that "if it doesn't work out, to give them a call back." (Tr. 31). McCullough, however, claims that Hassett called and personally told him he was not taking the job because he had accepted a job with more stable hours.

2. McCrohan's job offer

McCullough spoke with McCrohan presumably before Hassett had turned down McCullough's job offer. However, there is disagreement between McCullough and McCrohan as to who called whom, with McCullough claiming that McCrohan initiated contact by calling and asking him for work, and McCrohan asserting that it was McCullough who called him at home either on March 5 or 6, to offer him a job. McCrohan denies ever having solicited or applied for work with Respondent before receiving McCullough's phone call. Finally, McCrohan testified that he did not inquire about Respondent's wage rate during this conversation, and did not reveal his Union affiliation to McCullough. McCullough, on the other hand, claims that McCrohan volunteered that he had been earning $15.00 an hour at his former employer and wanted to receive the same amount if hired by Respondent, and that he agreed to that amount (Tr. 166, 349).

Before making him a job offer, McCullough described the nature of Respondent's business to McCrohan and the type of work he would be doing. McCrohan, like Hassett, testified that McCullough told him he would be working a 9-hour day, 45-hour week. As previously noted, McCullough denies ever mentioning such work hours to applicants. McCrohan did not recall McCullough asking during this conversation how much experience he had. The conversation ended with McCrohan agreeing to think it over and get back to McCullough.

McCrohan called back the next day to accept the position offered him by McCullough, and spoke with Sue Fulton. He testified that the following day, Sue Fulton called him back and arranged for him to be interviewed on March 7 (Tr. 155). Although Sue Fulton corroborates McCrohan's claim that it was she who called McCrohan to arrange for the interview, McCullough testified, contrary to the above account, that it was he who called McCrohan to invite him for an interview, and that when McCrohan agreed to do so, McCullough asked Sue Fulton to schedule the interview (Tr. 350).

McCrohan testified that on the day of his interview, he filled out a job application and was interviewed by McCullough, and Greg and Sue Fulton, all of whom he claims took part in asking him questions. McCullough had no recollection of whether Greg and Sue Fulton were present at the interview. Sue Fulton, however, acknowledged being there but denied that she asked any questions. For his part, Greg Fulton initially denied being part of the interview process, noting that he might have been in the vicinity possibly preparing himself something to eat. However, on further examination Greg Fulton admitted being "partially" involved in the interview and to asking McCrohan at least one question involving his interest in progressing with the Company (Tr. 257).

McCrohan claims that the first question put to him by McCullough during the interview was whether he was a member of a union, a claim McCullough denies. Although a member of the Union for 22 years, McCrohan testified he denied any Union affiliation. McCrohan further

recalls McCullough asking if the $15.00 per hour wage rate McCrohan put on his application was firm. McCrohan replied that it was. McCullough, according to McCrohan, also asked about the type of work he had done, and specifically if he had done any "conduit or communication work" (Tr. 156). McCrohan recalls telling McCullough he only had a "limited amount" of residential experience(Tr. 169). The interview, McCrohan claims, lasted about one-half hour, and ended with McCullough promising to call him back. McCullough called McCrohan later that evening and offered him the job, which McCrohan accepted. On March 11, McCrohan reported to Respondent and, after signing an employment agreement containing certain restrictions(GCX-17), began work.[12]

McCrohan claims that after just a few days on the job, McCullough mentioned that had he asked for a hire wage rate, McCrohan would have received it. He further claims that on or around March 21, McCullough told him that he had just received a call from "Jim Conroy, the organizer for 654" who asked to speak with McCrohan. McCrohan asked McCullough if he should speak to Conroy, and McCullough responded that that was his decision to make (Tr. 160). McCrohan testified, without contradiction, that at no time prior to this call had he disclosed his Union affiliation to Respondent.

McCrohan further testified that on April 4, Conroy's name again came up while he and McCullough were having lunch in the latter's home. Thus, he claims that during their lunch break, McCullough, Sr. joined them and at one point asked McCullough if he had heard anymore from "that union man," referring to Conroy. When McCullough replied, "not lately," McCullough, Sr. remarked, "Next time you hear from him send him over to my house, and I'll put a gun to his head and shoot him and gut him like a deer. I want to see some union blood." Neither he nor McCullough responded to McCullough, Sr.'s comment (Tr. 162). McCullough denies being present during any such conversation (Tr. 399-400) The record reflects that McCrohan left Respondent's employ on April 29, purportedly to engage in an unfair labor practice strike (Tr. 406).[13]

3. Hart's job offer

McCullough claims he called Hart on March 5, asked him about his work experience, if he had a means of transportation, whether he had difficulties working regular hours, and when he might be able to start work. He also recalls that Hart asked for a specific wage rate, but was unable to recall what that rate was. McCullough testified he offered Hart employment during the phone call, and that Hart asked for more time to think it over. McCullough called him again two days later and asked if he was still interested in working for Respondent, at which point Hart accepted the offer, and began work on March 11. He claims the subject of union membership was never discussed, and denies asking Hart if he was a member of a union (Tr. 356-357).

Hart recalls receiving a call from McCullough on the evening of March 5, during which McCullough asked him about his qualifications and experience and stated he would be working

[12] As more fully discussed infra, paragraph 4 of the employment agreement prohibits employees from discussing their "payroll rate" among themselves.

[13] While there appears to be disagreement between the General Counsel and Respondent as to whether McCrohan quit or was discharged, I need not address this question for McCrohan is not alleged to be a discriminatee, and the question of how McCrohan came to leave Respondent's employ is of no relevance to the issues presented here.

a 45-hour week.[14] According to Hart, at one point McCullough stated, "I have to ask you this, are you union?" Hart truthfully responded he was not (Tr. 104). Further, while Hart, as noted, claims he told Sue Fulton he was looking for a $13 per hour wage rate, McCullough, Hart further claims, asked if he would be willing to take $12.50 per hour. Hart agreed to do so, at which point McCullough offered McCrohan, and the latter accepted, employment with Respondent. On March 11, his starting date, Hart completed an employment application and, like McCrohan, signed an employment agreement (GCX-13). He testified that for the most part he worked as a helper to McCrohan until the latter left.

Hart claims that before McCrohan left in late April, he mentioned he was going "on strike for unfair labor practices" (Tr. 121). Further, he recalls having had two separate conversations with McCullough involving McCrohan. The first conversation, according to Hart, took place in the basement of McCullough's home and occurred on or around April 29, McCrohan's departure date. Hart recalls that during this conversation, McCullough mentioned that "he had known the whole time that McCrohan was in the union." He further recalls hearing McCullough telling someone over the phone later that afternoon that he, as well as Greg and Sue Fulton, had known "all along that John [McCrohan] was in the union" (Tr. 109-110). The second conversation, Hart claims, took place on May 5, again in McCullough's basement. Hart recalls that McCullough was yelling him that day for having left work early the day before, and at one point remarked that he had not been too happy with McCrohan because the latter did not do enough work or been aggressive enough. McCullough, according to Hart, went on to describe McCrohan as an "idiot" and a "pussy" who "was not man enough to come in and take his paycheck personally," and further threatened to "punch [McCrohan] in the mouth" if McCrohan were to come in for his check (Tr. 108-109).[15]

McCullough, as indicated, admits having a conversation with Hart on May 5, during which he expressed his disapproval at Hart's leaving work early on the previous day, and admittedly referred to McCrohan as a "pussy" because the latter had walked out on him when there was work to be done. However, he denies having threatened to punch McCrohan, or telling Hart that he knew McCrohan was a union member (Tr. 363-364). McCullough was not questioned about, and consequently did not contradict, Hart's assertion of an earlier April 29, conversation between the two during which he, according to Hart, made reference to McCrohan's union membership. Nor did he deny having been involved in a phone conversation on April 29, during which he mentioned that Greg and Sue Fulton had known of McCrohan's union affiliation.

[14] While the General Counsel asserts on brief (p. 34) that Hart's conversation with McCullough occurred on March 4, Hart's testimony makes clear it took place the following day, March 5 (Tr. 103).

[15] Contrary to Respondent's assertion on brief, Hart did not testify to having had only one conversation with McCullough. Nor did he testify that McCullough's remark about knowing of McCrohan's Union membership occurred on May 5 (RB: 25-26). Rather, Hart recalled having had two separate conversations with McCullough, one on April 29, the other on May 5. Hart's testimony is that McCullough's comments about knowing of McCrohan's Union membership, and the phone conversation in which he overheard McCullough make reference to the Fulton's own knowledge of McCrohan's affiliation, were made on April 29. The Respondent also suggests that Hart must have been mistaken about having a May 5, conversation with McCullough, noting in this regard that May 5, fell on a Sunday and presumably was not a work day. The Respondent, however, ignores the fact that McCullough admitted having had a conversation with Hart "on or about May 5" (Tr. 363).

Hart testified that he voluntarily left Respondent's employ soon thereafter (Tr. 117, 127). Although McCullough agrees that Hart was not terminated, he demonstrated uncertainty as to Hart's employment status. McCullough explained at the hearing that when Hart walked off the job, he indicated he was going on an unfair labor practice strike and that, consequently, he could say for sure if Hart was still an employee. He claims he made several unsuccessfull attempts to contact Hart to ascertain if he planned on returning to work (Tr. 364-365). Sue Fulton also demonstrated uncertainty as to Hart's status, testifying that since Respondent's records contain no "release date" for Hart (RX-2), the latter "technically" remains employed by Respondent (Tr. 333, 335).

D. Respondent's second round of hiring

McCullough began looking for a replacement following McCrohan's departure. In this regard, McCullough asked Sue Fulton to contact the individuals listed on RX-1, who had responded to his March 3, ad, to see if they were stilling seeking employment (Tr. 358). In the interim, he obtained temporary workers through Raymond Carson Associates, an employment agency. Sue Fulton claims she called all the individuals listed in RX-1, as requested by McCullough, but that none returned her call (Tr. 313). Her claim in this regard is rejected as not credible, for Rapposelli and DeJohn, two of the individuals on the list, testified they responded to Sue Fulton's call, and McCullough himself admits receiving calls from both of them. Neither Rapposelli nor DeJohn was hired.

Following his phone call, Rapposelli, accompanied by fellow Union member Brian Powers (not named as a discriminatee), visited Respondent's office on April 30, and filled out job applications. On their applications, Rapposelli and Powers both listed their salary requirements as either "negotiable" or "open," and named Conroy as a reference. Both were also interviewed by McCullough and Greg Fulton.

Powers did not testify at the hearing. Rapposelli testified that his interview lasted approximately ten minutes, and that during the interview McCullough asked him about his work experience and mentioned that most of Respondent's work was residential in nature. Rapposelli told McCullough he had some residential work, but conceded it was very limited. Asked if McCullough ever mentioned that he was looking for someone with at least ten years of residential experience, Rapposelli at first testified that McCullough had so stated, but subsequently asserted that he could not recall whether McCullough had made any such statement (Tr. 86, 89). He did, however, recall telling McCullough that he was flexible on the subject of wages.

DeJohn also filled out a job application, and testified that after doing so, he received a call from McCullough during which he was asked about his work experience and whether he had taken any classes. He recalls McCullough stating that he was looking for an electrician with residential experience, and further commenting that DeJohn had only commercial and industrial experience. DeJohn purportedly told McCullough he had worked at the Franklin Mint in Philadelphia doing residential work, but admitted the job was of short duration. The entire interview, according to DeJohn, lasted some five minutes. He testified that at no time did McCullough ask him if he was seeking a specific wage amount, and that following this phone conversation he heard no more from Respondent.

McCullough denies interviewing or speaking with DeJohn about his application.[16] Rather, he explained that he made the decision not to hire DeJohn based solely on his job application alone, and that he did not hire DeJohn because the latter listed his salary requirements as "negotiable" (Tr. 360-36, GCX-5). McCullough also provided limited testimony regarding the Rapposelli interview, testifying only that he did ask Rapposelli about his job qualifications, He claims that both Rapposelli and Powers were not hired because they had little residential work experience and did not provide him with a specific wage rate (Tr. 359).[17]

In late May, McCullough did hire a replacement for McCrohan, one Pat Cody, who had been working for Respondent as a Raymond Carson Associates temporary employee. On June 15, McCullough also hired his brother, , Patrick McCullough, presumably as a replacement for Hart (Tr. 361, 367).

IV. Discussion and Findings

A. Sue Fulton's supervisory status

The complaint alleges, the General Counsel contends, and the Respondent denies that Sue Fulton, Respondent's office manager, is a statutory supervisor as defined by Section 2(11) of the Act. I find merit in the allegation.

Section 2(11) defines a supervisor as follows:

> "…[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The above definition is phrased in the disjunctive, meaning that the possession of any one of the listed indicia provides a sufficient basis for finding supervisory authority. *T.K. Harvin & Sons*, 316 NLRB 510, 530 (1995); *Northcrest Nursing Home*, 313 NLRB 491 (1993).

Sue Fulton's duties as office manager are varied and include handling the Company's payroll, paying its bills, billing clients, answering the phone, and monitoring the two-way radio used to communicate with field personnel. She also is responsible for placing the Company's help-wanted ads, receiving phone calls from, and providing information to, interested

[16] The Respondent's assertion on brief (RB:16), that "they (referring to DeJohn, Powers, and Rapposelli) provided no more information in their interview with Bill McCullough", appears to contradict McCullough's claim that he never interviewed DeJohn, and to corroborate DeJohn's assertion that he was in fact interviewed by McCullough.

[17] McCullough's assertion at the hearing, that he did not hire Rapposelli, in part, because he had little residential experience, was not cited as a reason by the Respondent in a July 2, letter it sent to the Regional Office explaining why the seven discriminatees were not considered for employment or hired. Rather, Sue Fulton, who prepared the letter, stated only that Rapposelli was not hired because "[w]hen asked [for his] salary requirement he replied "negotiable" (GCX-25). No explanation is shown in the July 2, letter for Powers presumably because he is not alleged to be a discriminatee. Sue Fulton's letter, however, does explain that DeJohn was not hired because he "also answered 'negotiable' when asked [for his] salary requirement."

applicants, scheduling appointments and interviews for potential new hires, and providing them with tax forms when hired. The record, more specifically her own testimony, makes clear that Sue Fulton also possesses and exercises authority to hire and fire, and to set employee wages. Thus, she testified to having hired a clerical employee, Eileen Mertides, to assist in the performance of her office-related and other duties, setting Mertides' salary, and terminating her three months later (Tr. 304-305). I find nothing in Sue Fulton's testimony to suggest that her actions regarding Mertides employment were ministerial in nature involving no exercise of judgment or discretion. Rather, it is fairly apparent from her testimony that Sue Fulton exercised independent judgment in deciding hire and fire Mertides, and in setting her wages. It is further apparent, from the language in paragraph 4 of the agreement employees are asked to sign when hired, that Sue Fulton also has authority to to hear and resolve employee complaints. Specifically, paragraph 4 states that employees are to address "any and all" dissatisfactions either to their immediate supervisor or the office manager, who happens to be Sue Fulton. In light of these facts, there can be little doubt that Sue Fulton was, at all material times herein, a supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the Act.[18]

B. The alleged Section 8(a)(1) conduct

1. The interrogation of job applicants

The complaint alleges, and the General Counsel contends, that on three different occasions the Respondent, through McCullough and Sue Fulton, questioned applicants for employment about their union affiliation. McCullough, for example, is alleged to have questioned Hart during his March 5, phone interview, and McCrohan during his personal interview on March 7. Sue Fulton is alleged to have interrogated Dostellio on March 7. The Respondent denies the allegations, arguing that McCullough credibly denied having questioned either Hart or McCrohan about their Union affiliation, and that as to McCrohan, Sue and Greg Fulton testified they did not hear McCullough ask him any such question during his interview. It further contends that that there is no evidence that Sue Fulton interrogated Dostellio, and that Dostellio's claim to the contrary cannot be believed because the latter was not, in its view, a credible witness. I find merit in the allegations.

First, I was unimpressed by McCullough as a witness, both from a standpoint of his demeanor, and from the inconsistencies and improbabilities in his testimony. McCullough, for example, was not being truthful when he testified that of all the applicants who called in on March 4, he contacted Hassett first because the latter's name was the first one on the list provided him by Sue Fulton. A review of RX-1 reveals that Hassett's name is third, not first, on the list, preceded by Conroy and another applicant, Ed Blake. McCullough's claim at the hearing, that he did not know what a union was, also strains credulity. McCullough's assertion at the hearing that he has hired union-affiliated employees in the past makes clear that he must have had some prior knowledge of unions. Indeed, given the extent of his experience in the industry as a master electrician, it is highly unlikely McCullough would have been unfamiliar with unions. Nor do I find credible McCullough's professed ignorance of whether Hart was still in the Respondent's employ, particularly since he admitted to having hired a replacement for Hart

[18] Sue Fulton's description of herself as a part of a team with her husband in the running of the business, and her involvement in the McCrohan interview, further serves to undermine Respondent's claim that Sue Fulton was a mere office manager performing routine clerical duties. Rather, such conduct is consistent with someone holding a position of managerial/ supervisory authority.

(367). Accordingly, I give little weight to McCullough's overall testimony and reject it whenever it contradicts the testimony of other more credible witnesses.

I found Hart and McCrohan to more believable than McCullough and am convinced, notwithstanding some minor discrepancies in their testimony, that they testified in an honest and straightforward manner. Thus, as between Hart's and McCrohan's assertion that McCullough asked them about their union affiliation, and the latter's denial of the same, I credit the former. The Respondent's suggestion, that Sue and Greg Fulton corroborated McCullough's denial that he asked McCrohan about his union status, is not supported by the record evidence. Sue Fulton, for example, testified only that she did not recall "whether there was any discussion with Mr. McCrohan or in the course of the interview involving Mr. McCrohan's status as a union member" (Tr. 296). For his part, Greg Fulton was never asked to confirm or deny McCullough's claim, nor for that matter was he asked to describe what he may have heard McCullough say to McCrohan. Accordingly, I am convinced, and so find, that McCullough did question both Hart and McCrohan about their union affiliation during their respective interviews.

As to the allegation that Sue Fulton interrogated Dostellio, the Respondent is incorrect in asserting that there is no evidence that any such interrogation took place, for Dostellio testified unequivocally that within a day or so of his initial March 4, phone call inquiring about the ad, Sue Fulton called him and, after questioning him about his work experience and current work status, asked Dostellio, "Are you union?" Sue Fulton never specifically denied having spoken to Dostellio or asking him about his union status. Rather, she testified only that she did not recall having any further conversation with Dostellio other than the first one on March 4 (Tr. 293).[19]

The Respondent, however, argues that Dostellio should not be credited. Thus, it states that Dostellio's assertion, that Sue Fulton questioned him on whether his prior employers were union contractors and whether he was union, cannot be believed because none of the other applicant witnesses testified to having been asked such questions by Sue Fulton. I see no reason to reject Dostellio's otherwise undisputed account of the March 7, phone call simply because other applicants who called on March 4, to inquire about the ad may not have been subjected to similar questioning by Sue Fulton. Dostellio, as noted, also called on March 4, and, like the other callers, was not asked any questions about his union affiliation or employment with union contractors. However, the March 7, call to Dostellio occurred under different circumstances. By then, the Respondent knew full well, from Conroy's visit a few days earlier and from the information passed on to him by Sue Fulton, that many of those who expressed an interest in the ad by calling on March 4, had some Union affiliation, and may have become convinced that the Union was engaged in efforts to organize its operations. The Respondent, as made clear by its March 11, threat to close operations should it become unionized (see discussion infra), obviously was opposed to any such efforts. This, in my view, reasonably explains why Sue Fulton chose to question Dostellio about his union affiliation, and why McCullough likewise felt compelled to interrogate McCrohan and Hart as to their union membership. Accordingly, I credit Dostellio and find that he too was questioned by Sue Fulton about his union affiliation.

[19] The Respondent mischaracterizes Sue Fulton's testimony regarding the second phone call. Thus, it claims on brief (p. 10) that Sue Fulton "recalls receiving no second telephone call from" Dostellio. However, the question put to her by Respondent, and to which she responded "No", was whether she "recall[ed] any telephone calls other than that on the first day from… Dostellio." Thus, Sue Fulton never denied having had a second phone conversation with Dostellio, and testified only that she could not recall having a second conversation (Tr. 293).

The Board has long held that questions about union activities or sympathies in the context of a job interview are inherently coercive, without accompanying threats, even where the employee is subsequently hired. *Culley Mechanical Co.*, 316 NLRB 26, 27 at fn. 8 (1995). Here, the interrogation of Hart and McCrohan by McCullough, the one responsible for the hiring, occurred during their respective interviews. Sue Fulton's questioning of Dostellio regarding his past work experience and his current employment status, and her suggestion that he fill out an application, was tantamount to an interview.[20] See, e.g., *Wilmar Electric Service*, 303 NLRB 245, 251 (1991). In neither Hart's, McCrohan's, or Dostellio's case was an explanation given as to the reason for the inquiry, nor were any of these applicants provided with assurances that their chance for employment would not be jeopardized if they disclosed any such affiliation. In the absence of such assurances, all three applicants could reasonably have believed that an affirmative response to McCullough's or Sue Fulton's inquiry on whether they were union members would adversely affect their employment prospects. *Adco Electric*, 307 NLRB 1113,1117 (1992). Accordingly, I find that McCullough's questioning of Hart and McCrohan, and Sue Fulton's questioning of Dostellio, was coercive and violative of Section 8(a)(1) of the Act.

2. The threat to close its operations

The complaint alleges that the Respondent also violated Section 8(a)(1) when McCullough told Conroy on March 11, that "if his shop went union, he'd go out of business." While admitting that McCullough made the remark, the Respondent nevertheless argues that the remark was made "in the context of a discussion of the perceived economics of unionization and wage scale in the context of a given individual business" and, therefore, amounted to nothing more than a lawful expression of McCullough's views and opinion protected under Section 8(c). It further argues that the remark is not coercive because it was made not to an employee but rather to a union organizer. Respondent's argument is without merit.

Initially, I credit Conroy's version of the March 11, conversation and find, contrary to McCullough's claim, that no discussion or comparison of wages took place. McCullough, as previously found, was not a very credible witness. McCullough testified on direct examination that he was able to compare the Union's wage scale with what Respondent charged its customers because he obtained information about the Union's rates from employees (Tr. 355). However, on cross-examination he seemed to contradict himself when he admitted not knowing what "specific wage rate the union paid its employees" (Tr. 385). This inconsistency in his testimony, and his further admission that his threat to close the shop was made without knowledge of what wage rate would have to be paid by Respondent if it became unionized, strongly undermines McCullough's claim of having discussed wages with Conroy during the March 11, conversation. Accordingly, I find, as testified to by Conroy, that the entire conversation lasted some ten minutes, involved a discussion by McCullough of the nature of Respondent's business, and a recitation by Conroy of the benefits the Union could provide to Respondent, but did not involve any discussion or comparison of wages. Having so found, I

[20] The record makes clear that Respondent often hires employees over the phone before receiving a job application. Hassett, in fact, was offered employment without having submitted a formal job application. Further, given her participation in McCrohan's job interview, it is patently clear, notwithstanding Respondent's claim to the contrary, that Sue Fulton does involve herself in the hiring process, making it more likely than not that her questioning of Dostellio was in the nature of an interview.

turn next to Respondent's claim that McCullough's comments were protected under Section 8(c).

The Respondent correctly points out that Section 8(c) of the Act permits an employer to express "any views, arguments, or opinions" concerning union representation without running afoul of Section 8(a)(1), provided that the expression "contains no threat of reprisal or force or promise of benefit." This right of free expression includes the right of an employer to express an opinion or make a prediction regarding the effect unionization would have on its operations. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). However, any such prediction of dire economic effects stemming from unionization must not contain "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him." If such a prediction is made, it must be supported "on the basis of objective fact to convey an employer's reasonable belief as to demonstrably probable consequences beyond his control." Id.

Here, there is no credible evidence to show that McCullough's prediction about Respondent closing its operations if it became unionized was based on objective facts reflecting demonstrably probable consequences beyond Respondent's control. Indeed, without knowing what the going Union wage scale was or what the Union might seek in terms of a wage rate for employees, McCullough could not possibly have known if unionization would have any adverse economic consequences on Respondent's business. Thus, it is fairly apparent, and I so find, that McCullough's remark, made during Conroy's recitation of how the Union could benefit Respondent, was intended to convey Respondent's opposition to unions and its willingness to shut down operations to avoid becoming unionized. In these circumstances, McCullough's remark amounted to an unlawful threat to close and violated Section 8(a)(1) of the Act.

3. Creating an "impression of surveillance" allegation

It is further alleged that the Respondent created an unlawful impression of surveillance when McCullough told Hart on or about April 29, that he knew former employee McCrohan had been a Union member. While McCullough denies having discussed McCrohan's union affiliation with Hart, I credit Hart's assertion that he did so.

In determining whether a respondent has created an impression of surveillance, the Board looks to "whether employees would reasonably assume from the statement in question that their activities have been placed under surveillance." *United Charter Service*, 306 NLRB 150 (1992). The Respondent contends that even if McCullough is found to have made the comment about McCrohan's union's status to Hart, there is no basis for assuming that McCullough acquired such knowledge about McCrohan through unlawful surveillance.[21]

[21] The Respondent suggests, without offering proof, that McCullough could have learned of McCrohan's Union affiliation by overhearing McCrohan and Hart discuss Union-related matters at the workplace. Its argument in this regard is speculative at best, for McCullough makes no claim of having acquired knowledge of McCrohan's Union affiliation in this manner. There is to be sure disagreement between McCrohan and Hart on whether they discussed Union matters at the workplace, with McCrohan claiming and Hart denying that such discussions took place. I need not resolve this apparent conflict in testimony, for even if I were to credit McCrohan, nothing in his testimony suggests that his own affiliation with the Union was ever a subject of discussion. Indeed, McCrohan's reluctance to reveal his Union affiliation to McCullough during his interview leads me to doubt that he would have thereafter risked disclosing his ties to the Union by openly discussing said ties with Hart at the workplace. Accordingly, Respondent's

Continued

However, the issue here is not whether McCullough engaged in the unlawful surveillance of McCrohan's activities, but rather whether he sought to create that impression by telling Hart that he knew of McCrohan's Union affiliation. Clearly, Hart had no way of knowing how McCullough learned of McCrohan's union membership for nothing in Hart's testimony suggests that McCullough provided him with any such explanation. Significantly, McCullough's remark to Hart followed on the heels of McCrohan's announcement to McCullough and Hart that he was going on an unfair labor practice strike. In light of these facts, McCullough's disclosure to Hart, that he had known all along of McCrohan's Union affiliation, could reasonably have led Hart to believe that McCullough might be keeping his activities under surveillance. For this reason, I find that McCullough's comment was coercive and violative of Section 8(a)(1) of the Act.

4. McCullough, Sr.'s alleged threat to physically harm Conroy

The General Counsel contends that the Respondent further violated Section 8(a)(1) of the Act when on April 4, McCullough, Sr. asked his son, McCullough, in McCrohan's presence, if he had seen Conroy lately, and that the next time McCullough saw Conroy, he should send Conroy to McCullough, Sr.'s house so he (McCullough, Sr.) could put "a gun to Conroy's head and shoot him like a deer" because he wanted "to see some union blood." Such threats of physical harm to an union organizer, the General Counsel argues, are unlawful and violate Section 8(a)(1). He further argues that the threats made by McCullough, Sr. on April 4, are attributable to Respondent on grounds that McCullough, Sr. was acting as agent for Respondent within the meaning of Section 2(13) of the Act. I do not agree that the Respondent has violated the Act in the above-described manner.

Initially, I credit McCrohan and find that McCullough, Sr. did indeed make the above remarks to his son, McCullough, in McCrohan's presence. I reject in this regard McCullough's denial that he was not present during this April 4, conversation. McCullough, Sr. was not called to testify. I do not, however, believe that McCullough, Sr.'s remarks are attributable to Respondent, as the General Counsel has not, in my view, established him as an agent of Respondent as that term is defined in the Act and by the Board law. Section 2(13) of the Act states that "[i]n determining whether a person is acting as an 'agent' of another person so as to make that other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." As the Board has further explained, the test for determining whether an individual is acting as agent for the employer is whether under all the circumstances, "employees would reasonably believe that the [individual] in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987).

I find no evidence here to indicate that the Respondent ever held McCullough, Sr. out as authorized to speak on its behalf, nor anything to suggest that he may have been perceived as such by Respondent's employees. Nor is there any indication that McCullough, Sr. was privy to management decisions or had any involvement in Respondent's day-to-day business operations. There is, as pointed out by the General Counsel and as noted above, no disputing that McCullough, Sr. receives a bi-weekly check from Respondent in accordance with the terms of the consulting agreement. However, absent other evidence, the fact that such payments are being made does not constitute proof that McCullough, Sr. was serving as agent for the

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suggestion as to how McCullough might have learned of McCrohan's Union affiliation is based on pure speculation and is rejected as lacking in merit. Finally, that Hart and McCrohan disagree on whether they discussed Union matters at the workplace does not, in my view, affect their overall credibility.

Respondent on April 4, so as to render his conduct imputable to Respondent. More importantly, the consulting agreement, as testified to by Greg Fulton, was created not to create a consulting relationship but rather to avoid the adverse tax consequences stemming from the purchase and sale of McCullough Electric. Both he and McCullough testified, without contradiction, that McCullough, Sr. has never provided services to Respondent pursuant to the consulting agreement (Tr. 342). The General Counsel has produced no testimonial or other evidence to contradict the above assertions by Greg Fulton and McCullough.[22] While I have found that in other respects Greg Fulton's and McCullough's testimony was not credible, that fact alone does not render their testimony as to the consulting agreement unworthy of belief, for it is not uncommon for a trier of fact to believe some, but not all, of what a witness says. *Southern Maryland Hospital*, 288 NLRB 481, 485 (1988). In light of the above, I find the evidence insufficient to establish that McCullough, Sr. was an agent of the Respondent when he made the above remarks in McCrohan's presence. Accordingly, the Respondent cannot be found liable under Section 8(a)(1) for his remarks, warranting dismissal of this allegation.

5. The employment agreement

The complaint, as amended at the hearing,[23] alleges that the Respondent further violated Section 8(a)(1) of the Act by maintaining the following provision in its employment agreement (see, GCX-7):

[22] The record does reflect that McCrohan and/or Hart at one point retrieved some tools and materials from McCullough, Sr.'s home. However, McCullough testified that the tools and equipment were his and that he had simply stored them at his father's house. I credit McCullough's testimony in this regard. McCullough also admitted that there were two occasions in 1997, when he retained McCullough, Sr. on two separate jobs (Tr. 342-343). Neither the fact that McCullough's tools may have been retrieved from McCullough, Sr.'s home, or the fact that McCullough, Sr. may have done some brief work for Respondent on two separate occasions, constitute sufficient grounds for finding that McCullough, Sr. was, at all material times herein, an agent of the Respondent.

[23] At the hearing, the Respondent also opposed, on Section 10(b) grounds, the General Counsel's motion to amend the complaint to include this allegation. I adhere to my ruling allowing the amendment. As noted, the amendment alleges only the continued maintenance of the provision in the employment agreement, not its initial promulgation, to be unlawful. As such, the alleged misconduct here is not unlike an employer's continued maintenance of a no-solicitation rule that was found to be unlawful in *Alamo Cement*, 277 NLRB 1031 (1985). In *Alamo Cement*, the complaint had alleged that the employer's promulgation and maintenance of a no-solicitation rule violated Section 8(a)(1). The judge in that case found, with Board approval, that the allegation pertaining to the no-solicitation rule's unlawful promulgation was time-barred by Section 10(b) under the standard set forth in *Jefferson Chemical Co.*, 200 NLRB 992 (1972). He further found, however, again with Board approval, that the mere maintenance of the rule, as distinct from its promulgation, constituted "a continuing course of conduct" that was not barred by Section 10(b)'s six-month limitations period, and thus not subject to the *Jefferson Chemical* standard. Although the instant case involves an employment agreement rather than a no-solicitation rule, the reasoning in *Alamo Cement* is just as applicable here, for while claiming that no employee has ever been discharged for violating Paragraph 4 of the employment agreement (RB:19), the Respondent does not dispute that the agreement, including Paragraph 4, continues to remain in full force and effect. Accordingly, I reject as without merit Respondent's claim that the General Counsel was precluded by Section 10(b) from amending the complaint to allege the maintenance of Paragraph 4 of the employment agreement as unlawful.

> **4. DISCRETION.** Employee payroll rate should not be discussed with other employees. Any disclosure of this information will require immediate termination of all parties involved. Additionally, any discussion of work responsibilities, benefits and any and all other dissatisfactions of employee will be addressed only to the immediate supervisor or office manager.

I find merit in the allegation. The Board has long held that absent some legitimate and substantial business justification, an employer violates Section 8(a)(1) by maintaining a rule which prohibits employees from discussing their own wages, as well as other terms and conditions of employment, among themselves. *Waco, Inc.* 273 NLRB 746, 748 (1984); see, also, *Handicabs, Inc.*, 318 NLRB 890 (1995), *Steeltech Mfg.*, 315 NLRB 213 (1994), *Sweetwater Crafts*, 300 NLRB 18, 21 (1990), *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), *K-Mart Corp.*, 297 NLRB 80 (1989). The language of Paragraph 4 does precisely that. Thus, it expressly forbids employees from discussing not only wages among themselves, but also all other terms and conditions of employment. The Respondent has offered no justification for including Paragraph 4 in its employment agreement. The Respondent did provide some explanation for why the confidentiality language of Paragraph 3 was included in the agreement (RB:19). However, what is being challenged here are the restrictions imposed by Paragraph 4 on the employees' right to discuss wages and other terms and conditions among themselves, not the confidentiality provisions of Paragraph 4 (Tr. 14). As to Paragraph 4, the Respondent has proffered no legitimate or substantial business justification for prohibiting employees from discussing their wages and other terms and conditions of employment among themselves, or requiring that they bring their work-related matters, e.g., employee grievances, "only to the immediate supervisor or office manager." Accordingly, I find that the Respondent's continued maintenance of Paragraph 4 violates Section 8(a)(1) of the Act, as alleged.

C. The Section 8(a)(3) conduct

The General Counsel, as noted, also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment or hire the above-named discriminatees because of their membership in the Union. Where, as here, the allegation is that an employer refused to consider or hire applicants for employment because of their union membership, the burden of proof, consistent with the Board's holding in *Wright Line*, 251 NLRB 1083 (1980), rests in the first instance with the General Counsel to show, by a preponderance of evidence, that the alleged discriminatees applied for work, that the employer knew or had reason to know of their union affiliation, and that it harbored union animus. See, *Norman King Electric*, 324 NLRB No. 166 (1997), *KRI Constructors*, 290 NLRB 802, 811 (1988). Should the General Counsel succeed in making out a prima facie case, the burden under *Wright Line* shifts to the respondent to demonstrate it would have made the same hiring decision even if the applicants had not been associated with a union.

I find the General Counsel has satisfied his initial *Wright Line* burden of proof. There is first of all no question, and the Respondent does not claim otherwise, that the seven named discriminatees who called Respondent on March 4, in response to the ad were applying for work and that, with the exception of Hart, all were at the time Union members. Further, I am convinced that the Respondent learned of the alleged discriminatees' affiliation with the Union when they applied for work on March 4. In this regard, Dougherty, Phillips, Dostellio, Rapposelli, and DeJohn testified to having told Sue Fulton during their phone calls that they were members of the Union. Conroy disclosed being a member and organizer for the Union to Sue Fulton during his visit to Respondent's office sometime after his initial call on March 4.

Sue Fulton admits learning of Conroy's Union affiliation during his March 4, visit to Respondent's office. As to Dougherty, Phillips, Dostellio, Rapposelli, and DeJohn, Sue Fulton did not specifically deny their claims of having told her of their membership in the Union. Indeed, Sue Fulton's independent recollection of what individual callers may have told her consisted only of a brief conversation she purportedly had with Hassett regarding the latter's wife and newborn child. Regarding any mention of the Union, Sue Fulton recalled only that certain callers stated they had participated in a Union-sponsored apprenticeship program, but was unable to recall, without resorting to RX-1, which callers may have mentioned this to her. Given her poor recollection of events, I credit Dougherty, Phillips, Dostellio, Rapposelli, and DeJohn and find that each informed her of their Union membership during their respective phone calls. As to McNally, while he testified he told Sue Fulton only of having apprenticed with the Union, the notation "Belong to IBW union" found next to McNally's name on RX-1 makes clear that either McNally also mentioned his Union affiliation to her during his phone call, or Sue Fulton believed him to a member of the Union based on the disclosure of his Union apprenticeship. In light of the above, I find that Respondent was fully aware on March 4, and before it made job offers to Hassett, McCrohan, and Hart, that the seven named discriminatees were all members of the Union. I also find, based on its unlawful interrogation of job applicants as to their union affiliation, its attempt to create an impression of surveillance, and its threat to close operations if it became unionized, that Respondent harbored antiunion animus. In view of the foregoing, it is further found that the General Counsel has satisfied his *Wright Line* burden of proof. Accordingly, the burden now shifts to the Respondent to demonstrate that none of the discriminatees would have been hired even if they had not been Union members.

The Respondent raises two defenses to the refusal-to-hire allegation. First, it contends that job applicants who fail to disclose their salary requirements receive no consideration for employment because McCullough does not like to negotiate wages with applicants. The six alleged discriminatees, according to Respondent, did not provide Sue Fulton with a specific wage rate. Consequently, it argues that, consistent with McCullough's above practice, the seven discriminatees were properly denied employment consideration. Second, the Respondent contends that the discriminatees' "lack of residential qualification and/or prior experience" was also a factor in their not being considered for employment or hired (RB:30). I find both contentions to be without merit.

Initially, I am not convinced that applicants who fail to reveal a specific wage rate are denied consideration for employment presumably because of McCullough's aversion to negotiating wages with applicants. The only evidence of the existence of such a policy or practice, or as to how McCullough feels about engaging in wage negotiations, came from McCullough himself who, as found above, was not a credible witness. There is yet other evidence undermining McCullough's testimony in this regard. Hassett, for example, did not provide Sue Fulton with a specific wage rate when he called to inquire about the advertised position on March 4, but simply told her he was open on wages. The fact that no wage rate is shown on RX-1 for Hassett serves to corroborate his testimony as to what he told Sue Fulton. Yet, despite the fact that he had no way of knowing what Hassett was seeking in the form of wages, McCullough called Hassett to discuss his March 4, phone application and thereafter proceeded to offer him employment. Hassett's further assertion, which I credit, that McCullough asked him during his phone conversation how much he had been earning at his former job and would he be willing to accept that rate if hired by Respondent, makes clear that McCullough did not know what Hassett was looking for in terms of wages and was, in a sense, negotiating with Hassett.

There is also Hart's testimony, which I credit, that while he told Sue Fulton he wanted to be paid $13. per hour, during his subsequent phone conversation with McCullough the latter

offered to pay Hart $12.50 an hour, making clear that McCollough was not averse to negotiating with wages with applicants. Further, McCrohan's credited testimony, that McCullough mentioned, after hiring him, that he could have received a higher wage rate had he asked for one, serves to further undermine McCullough's assertion that he does not negotiate wages with applicants. The weight of the evidence therefore does not support, and indeed, contradicts, Respondent's claim that applicants who fail to disclose their wage requirements receive no hiring consideration because McCullough will not negotiate wages with applicants. I hereby reject this explanation as nothing more than a pretext. Accordingly, I reject this explanation and find the Respondent's above-stated reason was not a factor in its decision not to hire any of the seven discriminatees.

In rejecting Respondent's claim in this regard, I also reject as not credible Sue Fulton's claim that each individual who called on March 4, was, inter alia, asked to provide her with a specific wage rate, and that she recorded the individual responses onto RX-1. In so doing, I rely on the fact that all seven discriminatees credibly denied ever being asked any wage-related questions, and on the fact that Sue Fulton had little independent recollection of what the callers may have said to her. In fact, Sue Fulton's testimony regarding the March 4, phone calls was for the most part based the contents of RX-1. There are, however, reasons for doubting the overall reliability and trustworthiness of RX-1.

For example, it is clear from Sue Fulton's own testimony that RX-1 is inaccurate in that it does not contain certain information that should have been included therein. Thus, while testifying that her practice was to revise RX-1 to include any additional calls received by Respondent from the callers listed therein, Sue Fulton admitted RX-1 was not revised to reflect subsequent calls made by Conroy to Respondent. Nor were any revisions made to RX-1 to reflect the calls received by Respondent from Rapposelli and DeJohn during the second round of hirings. More importantly, Sue Fulton's claim that each caller was asked for their salary requirements and that she then entered their responses thereto onto RX-1 is not corroborated by RX-1, for five of the fifteen names listed on RX-1 (e.g., Conroy, Hassett, Ed Blake, Bob Dunegan, James Wood) contain no reference to wages. Nothing in Sue Fulton's testimony can be read to suggest that some or all of these five callers may have declined to provide her with such wage information.[24] Nor is it likely, given that they were applying for work with Respondent, that they would have chosen to ignore or to not respond to any such inquiry by Sue Fulton. Thus, if, as Sue Fulton claims, she asked each caller for their wage requirements, and if, as further claimed by her, such information was recorded onto RX-1, then one would reasonably expect to find a wage notation of some sort next to all fifteen names on the list. The fact that no such information is shown for five applicants establishes, at a minimum, the unreliability and inaccuracy of RX-1.

As noted, the Respondent also argues on brief (RB: 30) that it did not hire any of the discriminatees because they lacked residential electrical experience (RB:30). Several factors serve to undermine its argument in this respect. First, in a July 2, 1996 letter to the Regional Office explaining the reasons for not hiring any of the seven discriminatees, the Respondent does not mention this purported lack of residential experience as a basis for its decision.

[24] In fact, Hassett, as noted, admitted that Sue Fulton asked him if he had a desired wage rate, and that he responded he was "open" on wages. Yet, Sue Fulton did not enter his response onto RX-1. Conroy, as further noted, denies that Sue Fulton asked him about his wage requirements, and the fact that no wage-related entry is shown next to his name would tend to support his testimony that no such inquiry was made of him by Sue Fulton. The other three individuals did not testify.

Rather, as to all seven discriminatees, the Respondent states only that it was their failure to provide it with a specific wage rate that led to their not being considered or hired, an explanation which, as found above, I have already rejected as not credible. More importantly, however, McCullough's own testimony makes clear that the lack of residential experience was not the reason for him not considering the discriminatees for hire. Thus, when asked if the reason he did not call back any of the union applicants was because they had "indicated no set wage rate," McCullough responded, "That is correct." (Tr. 386-387). The raising of the "lack of residential experience" defense for the first time in its posthearing brief strongly suggests that the Respondent was searching for a convenient pretext to justify its unlawful refusal to hire the seven discriminatees because of their affiliation with the Union. *M.J. Mechanical Services*, 324 NLRB 812, 817 (1997).

Further, McCullough could not have rejected any of the discriminatees based on their purported lack of residential experience for he readily admitted that he "was not even sure if [the discriminatees] had the residential experience" (Tr. 387). Thus, when he offered employment to Hassett and Hart, McCullough had no way of knowing if any of the other applicants on the list provided to him by Sue Fulton may have had more residential experience than either Hassett or Hart. Nor could he have gleaned such information from the contents of RX-1, for while Sue Fulton apparently listed next to each discriminatee's name the total number of years experience each had as an electrician, no mention is made as to how much of that total experience involved residential work. Thus, when he called Hassett, McCullough would have known from looking at the list that Hassett had 12 years total experience as an electrician, but not how much of that was spent doing residential work. Hassett's testimony reveals that he never mentioned the extent of his residential experience to Sue Fulton when he called her on March 4, in response to the ad, and Sue Fulton has made no claim to the contrary (Tr. 25). If, as claimed by McCullough, he was searching for someone with extensive residential experience, then it would have made more sense to first inquire of Conroy, the second name on the list (just before Hassett's), who as shown on the list had a total of 27 years experience. While again there is no indication on RX-1 as to how much residential experience Conroy, given his 27 years overall experience vs. Hassett's 12 years total experience, would in all probability have been more experienced that Hassett in residential work. The same holds true for McNally who had 23 years total experience and Dostellio, who had 15 years experience, as well as several other individuals listed on RX-1 who are not named as discriminatees.

In sum, the weight of the credible evidence convinces me that the reasons proffered by Respondent for not considering for employment or hiring the seven named discriminatees, e.g., their failure to provide it with specific wage rates and their purported lack residential experience, are nothing more than pretextual explanations designed to conceal the fact that it had discriminated against them solely because of their Union affiliation. As the Respondent has not shown that the discriminatees would have received the same treatment even without regard to their Union affiliation, a finding is warranted, which I make here, that the Respondent's failure to consider or to hire all seven discriminatees was, as alleged by the General Counsel, motivated by anti-Union considerations and therefore violative of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. The Respondent, Diamond Systems, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and the Union, International Brotherhood of Electrical Workers-Local Union 654, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By interrogating job applicants about their Union membership, threatening to close its operation if it became unionized, creating an impression that its employees' activities were under surveillance, prohibiting employees from discussing wages and other terms and conditions of employment among themselves, and requiring that employees take all matters pertaining to their work responsibilities, benefits, or other dissatisfactions only to their supervisor or office manager, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

3. By refusing to consider for employment or to hire job applicants James Conroy, Steve McNally, Frank Dostellio, Rocky Rapposelli, Vince DeJohn, Kevin Dougherty, and Carl Phillips because of their membership in the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily failed and refused to consider for employment or to hire job applicants James Conroy, Steve McNally, Frank Dostellio, Rocky Rapposelli, Vince DeJohn, Kevin Dougherty, and Carl Phillips, I shall recommend that the Respondent be ordered to offer all seven discriminatees employment to the positions for which they applied without prejudice to any seniority or any other rights and privileges they would have been entitled to absent Respondent's hiring discrimination, and make said discriminatees whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them from March 4, the date they applied for employment, to the date the Respondent makes them a valid offer of employment. Such backpay amounts shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[25] The Respondent will also be required to notify all applicants who

[25] There is no suggestion here, nor evidence to show, that the Respondent hires employees on a job-to-job basis, thereby rendering inapplicable the type of remedy which the Board in *Dean General Contractors*, 285 NLRB 573 (1987), found would be necessary in such situations. The recommendation that the Respondent be required to offer employment and backpay to all seven discriminatees is consistent with the remedy provided by the Board in *Westpac Electric*, 321 NLRB 1322 (1996). As in *Westpac*, the Respondent here was on notice by virtue of complaint paragraph 7 that it was being charged not merely with refusing to consider the applicants for employment but also with refusing to hire all seven of the discriminatees. Thus, while it had an opportunity at the hearing to present evidence on this particular issue, it failed to do so. The fact that it hired only two individuals – McCrohan and Hart – does not necessarily mean that it only two vacancies existed, or that it had no intentions of hiring additional workers.

Continued

were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner, and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Diamond Systems, Inc., Chadds Ford, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully questioning job applicants about their Union membership, threatening to close its operations if it became unionized, creating the impression that it is keeping its employees' activities under surveillance, maintaining and enforcing a rule prohibiting employees from discussing wages and other terms and conditions of employment among themselves, and requiring that employees discuss their work responsibilities, benefits, and all their other dissatisfactions only with their supervisor or office manager.

(b) Refusing to consider for employment or to hire job applicants because of their membership in International Brotherhood of Electrical Workers, Local Union 654, AFL-CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer James Conroy, Steve McNally, Frank Dostellio, Rocky Rapposelli, Vince DeJohn, Kevin Dougherty, and Carl Phillips immediate employment to the positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of Respondent's hiring discrimination.

(b) Make whole the above individuals for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them, as set forth in the Remedy section of this decision.

(c) Within 14 days of the Order, notify said individuals that any future job applications will be considered in a nondiscriminatory manner.

Having failed to address this issue at the hearing, the Respondent should not be afforded a second opportunity to defend its refusal to hire decision at any subsequent compliance proceeding.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chadds Ford, Pennsylvania copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 1996.

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

George Alemán
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment about their membership in International Brotherhood of Electrical Workers, Local Union 654, AFL-CIO, or any other labor organization, create the impression that we are keeping our employees' union activities under surveillance, and threaten to close our facility if a union got in, and WE WILL NOT prohibit employees from discussing wages or other terms and conditions of employment among themselves, or require them to discuss their work responsibilities, benefits, and all their other dissatisfactions only with their supervisor or office manager.

WE WILL NOT refuse to consider or to hire applicants for employment because of their membership in the above Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer employment to James Conroy, Steve McNally, Frank Dostellio, Rocky Rapposelli, Vince DeJohn, Kevin Dougherty, and Carl Phillips to the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges to which they would have been entitled had they been hired.

WE WILL make the above-named individuals whole for any loss of earnings and other benefits resulting from the discrimination against them, with interest.

WE WILL, within 14 day from the date of the Order, notify them that any future job applications they may submit will be treated in a nondiscriminatory manner.

DIAMOND SYSTEMS, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, PA, 19106–4404, Telephone 215–597–7643.